

MEMORANDUM

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
OFFICE OF THE SECRETARY

TO : Les Morris
Office of Legislation and
Regulations Services
Health Services Administration

DATE: JUN 4 1980

FROM : Barry N. Walker, Attorney *BNW*
Business Law Branch
Business and Administrative Law Division

SUBJECT: Compensation of Indian Tribes for Use of Their Own Property

You have asked two related questions regarding reimbursement of Indian tribes for use of tribal property in the performance of contracts under which the tribe assumes responsibility for health care for its members.

The cost principles that are applicable contracts with tribes under P.L. 93-638, have two provisions that govern reimbursement of these costs. One of these relates specifically to motor pools and is found at 41 CFR 1-15.711-20 (attached). It specifically allows costs incurred by charges by a motor pool, or for costs of the motor pool itself. In most instances, the former would be direct costs and the latter indirect.

There is a more general provision at 41 CFR 1-15.711-11 (attached) entitled "Depreciation and use allowances." It permits contractors to be compensated either for depreciation or on the basis of use charges, for its own capital equipment or real property. It does not permit charges for the use of property paid for by the Federal Government. For example, buildings built with Economic Development Act funds could not be depreciated nor could charges be made for them. The section describes other requirements as well.

Therefore, leasing would not be required if the Tribe is to use its own property, and compensation could be paid under the preceding cost principles. If charges were made on this basis, there would be no reason to conclude that the restriction in the 1980 Appropriations Act had been violated. The legislative history of the Act indicates that the Senate committee which added the restriction was concerned about long term commitments made by IHS. The apparent feeling of the committee members was that long term leases were not likely to be economic and that they subverted the budgeting process.

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Use charges by the tribes are not the same as a long term lease entered into by IHS. Use of their own facilities is a natural concomitant of the tribes' assuming responsibility for their own health care. To say that specific appropriation act authority is required for such use would seem to severely restrict such assumption of responsibilities by the tribes, a result Congress should not be presumed to have intended.

I therefore conclude that within the requirements of the two regulatory provisions cited, tribes may be reimbursed for the use of their own equipment or real property. There is no need for leases, however, and any arrangement covered by those regulations would be acceptable.